United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1899

To be argued by
LOUIS R. ROSENTHAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1899

UNITED STATES OF AMERICA,

Appellee,

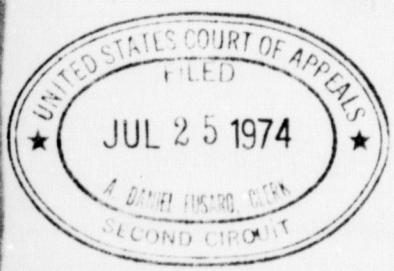
—against—

EDWARD TAYLOR HINMAN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT



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Preliminary Statement

This is an appeal from a judgment of conviction of the United States District Court for the Eastern District of New York, entered on June 7, 1974, after a jury trial. The defendant was found guilty of conspiracy to possess and distribute a quantity of heroin. (21 U.S.C. 841 (a)).

Issues Presented

1. Whether the evidence of a conspiracy was sufficient to allow introduction of hearsay statements of an alleged co-conspirator.

2. Whether the Trial Court properly admitted hearsay declarations of the defendant's co-conspirator.

3. Whether the Trial Court's interruption of defendant's summation prejudiced defendant's case.

Statement of Facts

Agent Salvemini of the Drug Enforcement Administration testified that he was introduced to the defendant Hinman on October 30, 1972 by an undercover informant (38).* According to Salvemini's testimony, at this meeting the defendant indicated that he could supply the agent with large quantities of narcotics, through contacts in Texas (38-39). The defendant gave Salvemini a sample (40), found to consist of approximately .003 ounces of heroin and .0003 ounces of cocaine (34-36). The agent then left saying that if the sample proved satisfactory, he would contact the defendant (42).

Subsequently, the agent called the defendant a few times at a number in the Washington D.C. area, which was supplied by the informant (44-48). The agent testified that the defendant called him on one occasion (48). No details were discussed in these conversations, and no deal was arranged. The informant then went to the Washington area, on the agent's instructions, to investigate the situation (89). There was no further contact between the agent and Hinman.

On December 7, 1972, the same informant introduced Agent Salvemini to Frank Seaman (49, 89). The agent testified that Seaman referred to a sample which he had sent through the defendant and said that he, Seaman, would arrange for a delivery of narcotics (52-54).

After further negotiations, on December 12th, Seaman and Daniel Homen delivered the drugs to Agent Salvemini (55-56).

The defendant and Seaman and Homen were indicted for conspiracy to distribute the narcotics.

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* All references are to the trial transcript unless otherwise indicated.

The only witnesses who testified against the defendant were a chemist, who identified the sample as containing heroin, two agents who had observed Hinman and Agent Salvemini in conversation, and Agent Salvemini himself.

Seaman was not called by the Government and did not testify at the defendant's trial. All his statements were testified to by Agent Salvemini. The defendant did not testify.

POINT I

The Government failed to submit sufficient competent evidence to show a conspiracy and enable admission of the hearsay statements of the alleged co-conspirator.

In *Glasser* v. *United States,* 315 U.S. 60, 74-75 (1942), the Supreme Court established that hearsay declarations of a co-conspirator "are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy."

This independent, non-hearsay evidence must show that a conspiracy actually existed and that the defendant participated in it. *United States* v. *Geaney,* 417 F.2d 1116 (2d Cir. 1969).

Although hearsay declarations may now be admitted "subject to connection," it has been said that:

> . . . the judge must determine, when all the evidence is in whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hea

> say utterances . . . if it has not, the judge must instruct the jury to disregard the hearsay.
>
> *United States* v. *Geaney, supra,* at 1120.

In the instant case, there is virtually no competent evidence to establish conspiratorial conduct on the part of the defendant Hinman. On the contrary, according to Agent Salvemini's testimony, Hinman never mentioned Seaman, nor did he indicate that the transaction would be completed by a third party, rather than by himself. In fact, negotiations never reached the point where Hinman was able to discuss any details with the agent concerning the sale. Instead, in their last conversation, Hinman stated that he was having difficulty making the necessary arrangements (p. 48). Finally, on cross-examination Agent Salvemini testified that all negotiations relating to the drugs he ultimately received were conducted by Seaman, not Hinman:

> Q. After you started dealing with Mr. Seaman, did you ever have any contact with Mr. Hinman? A. I never spoke to him again, sir, from the last time that I spoke to him on the phone.
>
> Q. And all your dealings about price and delivery and quantity were with Mr. Seaman; is that correct? A. For the package I received at the airport, Yes.
>
> Q. Yes. Time, place, delays? You spoke to Mr. Seaman about that? A. Yes, sir, that's correct.
>
> Q. And when Mr. Seaman and Mr. Homen were arrested at LaGuardia Airport was Mr. Hinman there? A. No sir, he was not. Not to my knowledge, anyway (pp. 100-101).

In short, the only evidence connecting the defendant with Seaman consists of those hearsay declarations of Seaman as to which Agent Salvemini testified.

The required conspiratorial agreement, therefore, cannot be established by non-hearsay evidence.

Although Agent Salvemini testified that the defendant gave him a sample of heroin, this act alone is not sufficient to support a conspiracy conviction. An overt act, such as this, is only one element of the crime which must be proved, in addition to an agreement between the parties and the necessary intent. As the court stated in *Hall* v. *United States,* 109 F.2d 976, 984 (10th Cir. 1940):

> An overt act alone is insufficient to constitute a conspiracy. There must be an unlawful agreement to which the overt act is referable.

In the present case there is no agreement between the defendant and Seaman to which Hinman's act can have reference.

It is therefore clear that the prosecution has failed to present sufficient, competent evidence to establish a conspiracy *prima facie.* Since defendant Hinman's conviction is thus not supported by the evidence it should be reversed.

POINT II

The declarations of the defendant's alleged co-conspirator should have been excluded from evidence as unreliable hearsay.

Under the traditional federal co-conspirator rule, hearsay declarations of a defendant's co-conspirator are admissible in evidence if they were made in the course of and in furtherance of the alleged conspiracy. *Krulewitch* v. *United States,* 336 U.S. 440 (1949).

The Supreme Court's decision in *Dutton* v. *Evans,* 400 U.S. 74 (1970), however, has cast considerable doubt upon the continuing validity of this rule, as potentially violative of the defendant's right to confrontation. As the Court

noted, there may be a "violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception". 400 U.S. at 82. Therefore, although *Dutton* involved a Georgia state law, it is nevertheless relevant to federal conspiracy trials.

In *Dutton*, the Court held that, in order to satisfy constitutional requirements, a co-conspirator's extrajudicial statements must possess sufficient "indicia of reliability". 400 U.S. at 80.

The Second Circuit in *United States* v. *Puco*, 476 F.2d 1099, 1107 (1973), further explained that:

> For future applications of *Dutton*. . . . we suggest that when a co-conspirator's out-of-court statement is sought to be offered without producing him, the trial judge must determine whether, in the circumstances of the case, that statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of cross-examination.

Although *Dutton* provided no guidelines for evaluating reliability, *Puco* noted that *"in most cases* the determination that a declaration is in furtherance of the conspiracy . . . will decide whether sufficient indicia of reliability were present." 476 F.2d at 1108 (emphasis added). This statement clearly indicates that not all hearsay declarations can be admitted solely on the basis of the traditional co-conspirator rule. One can conceive of numerous situations in which reliability, the new standard of admissibility, could not be assured merely by the fact that a statement was made in furtherance of an alleged conspiracy.

In the instant case, the only hearsay statement implicating the defendant is Salvemini's testimony that "he (Seaman) told me the package I would be receiving would be

good as the one he had sent me through Teddy
endant" (p. 52).

ding to *Dutton* and *Puco,* the admissibility of this
on is to be determined solely on the basis of
or not it is reliable.

nly possible indicia of reliability is that the state-
s made in furtherance of an alleged conspiracy,
as itself never shown. To say that these circum-
establish reliability is to employ circular reasoning:
tatement was made in furtherance of a conspiracy
that there is a subsisting conspiracy. In the con-
the co-conspirator rule, the law thus assumes the
of a conspiracy in order to admit evidence to
e existence of that same conspiracy. If a hearsay
on were to be admissible solely on the basis of the
ed co-conspirator rule, reliability would thus be
nothing more than an assumption. Moreover, the
of the *Dutton* Court to assure the defendant his
confrontation would be circumvented.

letermine reliability, it is therefore clear that the
ust consider all the circumstances of the case, not
the possibility that, if a conspiracy existed, the
ion in question would further its purpose. The
of circumstance here, however, indicates that Sea-
eclaration may be far from trustworthy. In fact,
had a compelling reason to falsely associate him-
h the defendant: in this way, he could rely on the
of Hinman's sample as relayed by the informant
having to provide one of his own.

as precisely this type of situation at which the
ruling was directed. In that case, one of the
for a reliability finding was that the declarant
apparent motive to lie." 400 U.S. at 89. As such

a "motive to lie" does exist in the present case, the trial court should have excluded the hearsay statement from evidence.

The Court in *Dutton* also held that reversal was not required because the evidence admitted was not crucial to the prosecution or devastating to the defense. 400 U.S. at 87.

In the present case, however, the hearsay declarations of Seaman supply the only link between him and the defendant. They thus constitute the only evidence supporting an essential element of the crime charged, namely an agreement between the alleged co-conspirators. Consequently, it is indisputable that this evidence was crucial to the Government's case, so that its admission constitutes reversible error.

POINT III

The Judge's interruption of the defendant's summation prejudiced the defendant's case.

During the summation of the defense, the court interrupted with an instruction to the jury:

> Mr. Rosenthal: I can't cross-examine Mr. Seaman. He's not here. I can't ask him any questions. But even if he told that to the agent: I am with Teddy, how do we know that that is true? How do we know even if he said: I am with Teddy, I can get the stuff, I work with him. We don't have Mr. Seaman here. We can't look at him to find out if he's a truthful witness.
>
> Even if we accept the agent's word—
>
> The Court: I shall charge that Mr. Seaman is available to both sides and you can draw no adverse inferences on either side for the failure to produce Mr. Seaman (pp. 117-118).

At this point, it appears that defense counsel was attempting to point out to the jury that the contents of Mr. Seaman's hearsay declarations need not be accepted as the truth and to indicate those circumstances which may cast doubt upon the credibility of these statements.

Although the Court's instructions may have been correct, interruption at this point could have misled the jury into believing that counsel's comments were incorrect and that the truthfulness of of Mr. Seaman's statements could not be questioned.

This inference would necessarily be highly prejudicial to the defendant, in that Seaman's declarations constitute almost the only evidence against the defendant. The court's interruption at this crucial point of the summation was therefore improper.

CONCLUSION

The judgment of conviction appealed from should be reversed.

Respectfully submitted,

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